

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 15, 2009 Session

MELDRIC JONES v. MICHAEL AND PAMELA JENKINS

**Appeal from the Circuit Court for Rutherford County
No. 53169 J. Mark Rogers, Judge**

No. M2008-01911-COA-R3-CV - Filed June 29, 2009

Tenant filed a complaint against landlords for injuries allegedly caused by a dangerous condition on the leased premises and for negligence. The trial court granted summary judgment to landlords, finding that (1) both parties were aware of the dangerous condition which was present at the time the lease was signed, (2) the location of a doorway on the leased premises was not a material fact, and (3) landlords were entitled to judgment as a matter of law. Tenant challenges the trial court's grant of summary judgment; the finding that the location of the doorway was not a material fact; and the court's application of comparative fault. Finding that landlords negated an essential element of tenant's claim, that the location of the doorway was not a material fact, and that the trial court did not perform a comparative fault analysis, we affirm the trial court's grant of summary judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J. joined.

Sonya W. Henderson and Howard M. Romaine, Murfreesboro, Tennessee, for the appellant, Meldric Jones.

W. Carl Spining and David P. Vial, Nashville, Tennessee, for the appellees, Michael Jenkins and Pamela Jenkins.

OPINION

I. Factual and Procedural History

Michael and Pamela Jenkins, owners and managers of several apartment complexes, leased a two-level apartment in Smyrna, Tennessee, to Meldric Jones on January 29, 2005. The stairway connecting the apartment's two levels had walls on both sides which ran the entire length of the

stairway, except for the bottom five steps on one side, which was open; there was no handrail on the open side.¹

During the morning of February 20, 2005, Ms. Jones was moving into the apartment; she worked by herself until around noon when her children arrived to help. As she descended the stairway to open the door for them, she fell off the stairs on the open side of the stairway and suffered a broken ankle, which was operated on and fitted with a cast.

Ms. Jones filed suit against the Jenkins alleging negligence in failing to maintain the premises in a reasonably safe condition, in failing to adequately warn of the dangerous condition of the stairway, and in failing to provide a handrail for support. Ms. Jones sought compensatory damages in the amount of \$100,000 for continuing physical and emotional injuries; past and future medical and hospital bills; past and future pain and suffering, both physically and emotionally; past and future loss of enjoyment of life; permanent impairment; loss of wages; and past and future loss of earning capacity.

The Jenkins answered the complaint, denying negligence on their part and alleging that Ms. Jones was comparatively at fault. After depositions were taken and discovery was conducted, the Jenkins filed a Motion for Summary Judgment. Ms. Jones responded to the motion, contending that summary judgment was not proper since genuine issues of material fact existed.

Following a hearing, the trial court granted the motion. Ms. Jones lodged an order purportedly setting forth the action of the court and including sixteen findings of fact. The Jenkins filed a Motion to Alter or Amend Judgment, asserting that the order lodged by Ms. Jones and adopted by the trial court inaccurately reflected the action of the court in ruling on the motion for summary judgment. The trial court granted the Jenkins' motion and entered an order which recited the following findings: (1) the stairway at issue is a dangerous condition that existed at the time of the incident; (2) the Jenkins knew of this dangerous condition at the time of the incident; (3) Ms. Jones knew and/or should have known of this dangerous condition at the time of the incident; (4) the location of the front door of Ms. Jones' apartment is not a material fact²; (5) there is no genuine issue of material fact; and (6) the Jenkins are entitled to judgment as a matter of law. Ms. Jones appeals.³

¹ The opening in the wall was located on the left side of the stairway when on the ground floor looking up the flight of stairs.

² The location of the front door to the apartment was an issue raised in the depositions. Ms. Jones asserted that the door is located to the right of the stairway, while the Jenkins asserted that it is directly in front of the stairway. See discussion *infra*.

³ Ms. Jones filed her appeal on August 8, 2008, after the trial court heard the motion to alter or amend but before the court's September 26 order was filed.

II. Statement of the Issues

On appeal, Ms. Jones alleges the following issues:

1. Whether the trial court erred in granting summary judgment to the Jenkins, as the court:

A) Failed to weigh facts at issue as to foreseeability of harm of danger versus availability of alternative conduct to avoid harm,

B) Failed to weigh facts at issue as to foreseeability of knowledge of harm by owner versus possible knowledge of danger by injured tenant,

C) Failed to weigh facts at issue as to cost to avoid foreseeable harm versus impact and amount of cost of foreseeable harm to tenants

2. Whether the trial court ignored material facts at issue as to location of front door and its relation to increasing foreseeability of harm due stair rail violation [sic].

3. Whether a complete adherence to comparative negligence in “open and obvious cases” is appropriate, and should have been applied in this case.

II. Analysis

A. Summary Judgment Motion

This appeal is from a grant of summary judgment. Summary judgment is appropriate where a party establishes that there is no genuine issue as to any material fact and that a judgment may be rendered as a matter of law. Tenn. R. Civ. P. 56.04; *Stovall v. Clark*, 113 S.W.3d 715, 721 (Tenn. 2003). Moreover, it is proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, it is not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that the party is entitled to judgment as a matter of law. *Godfrey v. Ruis*, 90 S.W.3d 692, 695 (Tenn. 2002). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party’s claim or show that the moving party cannot prove an essential element of the claim at trial. *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008).

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ’g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1977). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party’s favor. *Stovall*, 113 S.W.3d at 721;

Godfrey, 90 S.W.3d at 695. When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd*, 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

The summary judgment analysis has been clarified in two recent opinions by the Tennessee Supreme Court. See *Martin*, 271 S.W.3d 76; *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008). A party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; accord *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). A properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. See *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:

(1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

McCarley, 960 S.W.2d at 588; accord *Byrd*, 847 S.W.2d at 215 n.6; *Martin* 271 S.W.3d at 83-84.

"A claim of common law negligence requires proof of the following elements: a duty of care owed by the defendant to the plaintiff; conduct falling below the applicable standard of care that amounts to a breach of that duty; an injury or loss; cause in fact; and proximate or legal cause." *Gunter v. Laboratory Corp. of America*, 121 S.W.3d 636, 639 (Tenn. 2003) (citing *White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn. 1998)). The Jenkins, as the moving party, had the burden to negate one of these essential elements or establish that Ms. Jones could not prove an essential element at trial. *Martin*, 271 S.W.3d at 84 (citing *Hannan*, 270 S.W.3d at 8-9; *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n.5).

As a preliminary matter, we find it necessary to address the trial court's order to determine which element of negligence the court found to have been negated in granting summary judgment. In their "Memorandum in Support of Motion for Summary Judgment," the Jenkins challenged the duty element of Ms. Jones' negligence claim by relying on *Lethcoe v. Holden*, 31 S.W.3d 254 (Tenn. Ct. App. 2000), which held:

Generally a landlord is not liable to a tenant or a third party for harm caused by a dangerous condition.

The general rule of a landlord's non-liability is subject to several exceptions. One exception applies if the following facts are shown: (1) the dangerous condition was in existence at the time the lease was executed; (2) the landlord knew or should have known of the dangerous condition; and (3) the tenant did not know of the condition and could not have learned about it through the exercise of reasonable care.

Id. at 256 (citations omitted). "As a natural extension of this exception, 'a landlord is not liable for an invitee's injuries if both landlord and invitee' 'are equally aware of the dangerous condition and the invitee voluntarily exposes himself to the hazard.'" *Stillwell ex rel. Stillwell v. Hackney*, 2006 WL 3813631, at *5 (Tenn. Ct. App. Dec. 27, 2006) (quoting *Couture v. Oak Hill Rentals, Ltd.*, 2004 WL 2334149, at *3 (Ohio Ct. App. Sept. 24, 2004)).

The trial court's order granting summary judgment contained the following findings:

1. The stairway at issue is a dangerous condition that existed at the time of the incident for which Plaintiff filed this lawsuit;
2. Defendants, Michael Jenkins and Pamela Jenkins, knew of this dangerous condition on their property at the time of the incident;
3. Plaintiff, Meldric Jones, should have been aware that the dangerous condition existed at the time of the incident;
4. the fact that there is a dispute between Plaintiff and Defendants as to the exact location of the front door of the Defendants' property is not a material fact;
5. there is no genuine issue of material fact in this cause; and
6. Defendants are entitled to judgment as a matter of law.

The trial court's first three findings directly correspond to the three factors of the exception to the "landlord non-liability" rule. Since the court evaluated whether Ms. Jones fell within the exception to the rule and then ultimately granted summary judgment in favor of the Jenkins, we infer that the court found that the exception to the rule had not been met and that the Jenkins did not owe a duty of care to Ms. Jones. Consequently, we conclude that the trial court's grant of summary judgment was based on the Jenkins' negation of the "duty" element of Ms. Jones' negligence claim.

In support of their assertion that the exception to the "landlord non-liability" rule had not been met, the Jenkins attached to their summary judgment motion a "Statement of Undisputed

Material Facts”⁴ and the transcript of the deposition of Michael Jenkins,⁵ Pamela Jenkins, and Meldric Jones.⁶ These reveal that Ms. Jones (1) had seen the apartment before leasing it, (2) had been to the apartment on a number of occasions prior to the day of the accident, and (3) had traveled up and down the stairway a “dozen times” on those occasions and on the day of the incident. The materials submitted by the Jenkins were sufficient to negate an essential element of Ms. Jones’ negligence claim, *viz.*, that the Jenkins owed a duty of care to her inasmuch as they showed that she knew of the condition; consequently, she could not meet the exception to the “landlord non-liability” rule enumerated in *Lethcoe*. The burden then shifted to Ms. Jones to either come forward with

⁴ The Jenkins’ Statement of Undisputed Facts contained the following assertions, in part pertinent:

1. Michael Jenkins showed the apartment at issue to Meldric Jones prior to her renting said apartment.

3. The front door of the apartment leased by Meldric Jones is in front of the stairway at issue. . .

4. Before the accident in question, Plaintiff would usually go to this apartment after work and bring certain items to the apartment. . .

5. Prior to the accident in question, Meldric Jones traveled up and down the stairway at issue about a dozen times. . .

6. On the day of the accident in question, Meldric Jones had been downstairs, went upstairs, and then was on her way back down the stairs when the accident occurred. . .

7. The accident in question occurred in the daytime, around noon. . .

⁵ Michael Jenkins’ deposition, in part pertinent, stated:

Q. Okay. And this apartment that [Ms. Jones] was in, did you - - were you the one that actually showed it to her before she rented it?

A. Yes.

Q. And during your showing the apartment to her, did you two have any conversation at all about the open stairwell?

A. No.

⁶ Ms. Jones’ deposition, in part pertinent, states:

Q. . . . Can you tell me what time of day [the accident] occurred?

A. It was a few minutes past 12 noon.

Q. . . . Can you tell me what you were doing the morning before the accident?

A. I had started. . . either the dishwasher or washing machine. . . So I was up - - I had been up and about Sunday just regular routine, cleaning because I usually work on Sunday nights. So after I did whatever I did downstairs, was back upstairs again. And probably just cleaning or something. But I know I was upstairs when [her children] did knock [sic] on the door.

Q. Okay. Prior to the day of the fall, how many times would you say you had been up and down that stairwell?

A. I can’t tell you exactly how many times. What I would usually do when I got off from work, I would go to my apartment because it was, like, maybe ten minutes away and take a few items in. And a lot of times I would just leave them inside the door. I probably had traveled up and down those stairs, I would say, maybe - - maybe a dozen times. Maybe a dozen times.

evidence establishing material factual disputes that were over-looked or ignored by the Jenkins, producing additional evidence establishing the existence of a genuine issue for trial, or explaining the need for further discovery. *See McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215; *Hannan*, 270 S.W.3d at 8-9. This she failed to do.

To counter the motion for summary judgment, Ms. Jones asserted that the Jenkins' duty arose not as a result of the landlord/tenant relationship but either as a result of the application of the doctrine of negligence *per se* or because of the foreseeability of the harm caused by the open and obvious dangerous condition. In support of these assertions, Ms. Jones submitted a "Response to Defendant's Statement of Undisputed Facts"⁷; her deposition; a report and affidavit filed by Leighton Sissom, an expert in forensic engineering hired by Ms. Jones⁸; and copies of the local and national safety codes.⁹

⁷ In her response to the Jenkins' Statement of Undisputed Facts, Ms. Jones admitted each of the assertions, except for the statement regarding the location of the front door. Ms. Jones' response to that assertion stated: "Disputed. . .the doorway at the bottom of the stairs is not in front of the stairwell, rather it is clear that no part of the doorway is in front of the stairwell. . ."

Ms. Jones' response also included her assertions of undisputed material facts, which stated, in part pertinent:

8. The absence of a handrail on the open side of the stairwell, is a violation of the Standard Building Code §1112.5.3.

9. The absence of a handrail on the open side of the stairwell, is a violation of the National Safety Code §800.11. . .

12. Defendants have owned the apartment at issue. . .for approximately six (6) years. . .

16. Michael Jenkins has performed extensive remodeling, repairs and maintenance on the apartments.

⁸ Mr. Sissom's affidavit, which summarized his report, contained the following assertions, in part pertinent:

As a result of my investigation, I have determined that the condition in the building rented by Ms. Jones was indeed dangerous as it was in violation of multiple federal and local building codes in existence at the time of its construction.

It is my opinion that the Defendants have breached the duty of care owed to Plaintiff by failing to exercise reasonable care in maintaining compliance of her apartment with federal and local building codes.

The violations are as follows:

2. The absence of any type of handrail or barrier on the open side of the stairwell is a violation of the Standard Building Code §1112.5.3, and National Safety Code §800.11.

⁹ Mr. Sissom specifically cited the Standard Building Code §1112.5.3 and National Safety Code §800.1 as the regulations alleged violations by the Jenkins. The Standard Building Code §1007.5.2 states that "[s]tairways shall have handrails on each side," however, §1112.5.3 provides that "[s]tairways less than 44 inches wide and having a wall immediately adjacent to the treads on one or both sides may have handrails on one side only, which shall be the side without a wall where such condition exists."

(continued...)

The doctrine of negligence *per se*¹⁰ was discussed in *Harden v. Danek Medical, Inc.*, 985 S.W.2d 449 (Tenn. Ct. App. 1998), which stated:

In order to recover under the theory of negligence *per se*, a party must establish three elements. First, the defendant must have violated a statute or ordinance that imposes a duty or prohibition for the benefit of a person or the public. Second, the injured party must be within the class of persons intended to benefit from or be protected by the statute. Finally, the injured person must show that the negligence was the proximate cause of the injury.

Id. at 452. Tennessee courts have held that “[t]he violation of a municipal regulation or ordinance designed to provide for the safety of buildings and premises constitutes negligence *per se*.” *Kingsul Theatres, Inc. v. Quillen*, 196 S.W.2d 316, 318 (Tenn. Ct. App. 1946). However, the courts “have applied the doctrine of negligence *per se* in limited situations involving violations of the building code.” *Pittenger v. Ruby Tuesday, Inc.*, 2007 WL 935713, at *4 (Tenn. Ct. App. Mar. 28, 2007).

In order to succeed in her theory of negligence *per se*, Ms. Jones was required to prove that the Jenkins violated “a statute or ordinance that impose[d] a duty or prohibition” upon them for her benefit. *Harden*, 985 S.W.2d 452. While Ms. Jones and Mr. Sissom allege that the Jenkins violated provisions of the National Safety Code and the Standard Building Code, there is no proof in the record that either of these codes was adopted as “a statute or ordinance” by the municipality where the apartment was located.¹¹ As such, Ms. Jones’ negligence *per se* argument must fail since there is no proof that the Jenkins violated a “statute or ordinance.”

Ms. Jones also asserts that, due to the foreseeability of the harm from the dangerous condition, the Jenkins owed her a duty of care despite the condition being “open and obvious.” “[F]oreseeability is essential in analyzing the duty...element[] of a negligence claim.” *Lourcey v. Estate of Scarlett*, 146 S.W.3d 48, 53 n.2 (Tenn. 2004) (citing *McCall v. Wilder*, 913 S.W.2d 150,

⁹ (...continued)

The National Safety Code §800.11 states:

Handrails. Handrails shall be present on both sides of a stair system. Handrails shall have a height of not less than 30 inches nor more than 37 inches from the upper surface of the handrail to the front 1 inch run of the tread surface. Exception: one and two family dwellings may have handrails on only side of a stair system unless the stairway is open on both sides. If one side of the stair system is open, the single handrail shall be on the open side.

¹⁰ Ms. Jones’ negligence *per se* argument was raised for the first time in her “Response to Defendant’s Motion for Summary Judgment.” Ms. Jones never filed a motion to amend her complaint to include the claim.

¹¹ In fact, the Code of Ordinances for the town of Smyrna, Tennessee, where the apartment is located, states “[t]he International Existing Building Code, 2006 edition, and amendments thereto, is hereby adopted and incorporated by reference as part of this municipal code, and is hereinafter referred to as the existing building code.” Smyrna, Tenn., Code of Ordinances § 12-201 (2007).

153 (Tenn. 1995)). “A duty arises when the degree of foreseeability of the risk and the gravity of the harm outweigh the burden that would be imposed if the defendant were required to engage in an alternative course of conduct that would have prevented the harm.” *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 366 (Tenn. 2008); *McCall*, S.W.2d at 153 (citing Restatement (Second) of Torts, § 291 (1964)). However, “foreseeability alone is insufficient to create a duty.” *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 366 (Tenn. 2008).

In support of this contention, Ms. Jones relies on a number of cases that imposed liability upon premises owners for injuries resulting from an open and obvious dangerous condition based on the foreseeability of the harm. *See Winstead v. Goodlark Reg'l Med. Ctr.*, 2000 WL 343789, at *3-4 (Tenn. Ct. App. April 4, 2000) (finding that the premises owner of a hospital, whose personnel were “aware...of the possibility that [a dangerous condition] could pose a hazard to persons entering and leaving the hospital,” owed a duty of care to pedestrians for injuries caused by the open and obvious dangerous condition); *Coln v. City of Savannah*, 966 S.W.2d 34, 46 (Tenn. 1998), *overruled on other grounds by Cross v. City of Memphis*, 20 S.W.3d 642 (Tenn. 2000), (holding that an invitee could proceed with her negligence claim against homeowner by finding that “a risk is unreasonable and gives rise to a duty if the foreseeability and gravity of harm posed by a defendant’s conduct, even if open and obvious, outweigh the burden upon the defendant to engage in conduct that would have prevented the harm”).

The present case, however, is distinguishable in that the cases cited by Ms. Jones do not involve a duty of care imposed upon a landlord in a landlord/tenant relationship. As stated earlier, the general rule in Tennessee is that a landlord is not liable for injuries to tenants caused by a dangerous condition on the leased premises; this rule is inapplicable only when an exception has been met. *Lethcoe*, 31 S.W.3d at 256. No such exception exists in this record. We have not found nor has Ms. Jones cited any authority in which the “landlord non-liability” rule was superseded by the imposition of a duty on a landlord to the tenant based on the foreseeability of harm caused by a dangerous condition.

B. *Material Facts in Dispute*

Ms. Jones asserts that the location of the front door to the apartment was a material fact in dispute and that the trial court erred in finding that it was not material. She contends that the location was material because “the placing of the doorway to the right of the stairs, and having no stair rails [sic] on the right side of the stairs, created a kind of ‘trap’ for the unwary renter.” We do not find the location of the doorway to be a material fact in the determination as to whether the Jenkins owed a duty of care to Ms. Jones. Rather, this fact is most likely applicable to the causation element of Ms. Jones’ injuries, which was not the element the trial court found to have been negated. Thus, the location of the doorway does not alter the negation of the duty element of her claim and the trial court did not err in finding this fact to not be material.

C. *Comparative Negligence*

Lastly, Ms. Jones discusses the application of comparative fault to cases involving “open and obvious” dangers. In granting the summary judgment motion, the trial court did not reach the issue of comparative fault since the cause of action was dismissed for lack of a duty of care. Thus, we find that review of this issue is unnecessary.

III. Conclusion

For the reasons set forth above, the decision of the Circuit Court is AFFIRMED. Costs are assessed against Ms. Jones, for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE